IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 350 OF 2002

Manish Vijay Mhashelkar,)
Aged about 30 years,)
residing at 167, 1st Floor,)
Trimurti Co-op.Hsg.Society Ltd.,)
New Gulab Nagar,)
Near Hotel Pali Hill,)
Union Park, Khar Danda,)
Mumbai 400 052.) ...Petitioner

V/s.

1. The State of Maharashtra)
at the instance of)
Oshiwara Police Station,)

2. Savari Muthu Arunachalam,)
residing at 222, Adarsh Nagar)
Oshiwara New Link Road,)
Jogeshwari (W),)
Mumbai 400 012.) ...Respondents

Mr.Rishi Bhuta for the Petitioner.
Mr.Y.M. Nakhawa, APP for State.
Mr.J.S. Kini i/b. Mr.Suresh Dubey for Respondent No.2.

CORAM : V.M. KANADE, J.

DATED : AUGUST 30, 2007

ORAL JUDGMENT :-

. Heard the learned Counsel appearing on behalf of the petitioner and the learned Counsel appearing for the respondent.

2. The short question which falls for consideration before this Court is whether the Magistrate after taking take cognisance of a private complaint, after recording the verification of the complaint, can pass order passed under Section 156(3) of the Cr.P.C. directing the police to investigate the matter and if such an order under Section 156(3) of the Cr.P.C. cannot be passed, what is the course of action that is open to the said Magistrate.

3. Brief facts which are relevant for the purpose of deciding this writ petition are as under :-

. A complaint was filed by the respondent no.2 herein before the Magistrate and on the same date, the Magistrate took cognisance of the complaint and verification of the complaint was recorded. Thereafter, respondent no.2 filed an application stating therein that the matter may be referred to the police for investigation under Section 156(3). The said application was allowed and the matter was referred for investigation to the police under Section 156(3). The

police recorded a FIR on 17.12.2000 and arrested the petitioner herein. The petitioner filed revision application in the Sessions Court on 19.4.2001 and this revision application was dismissed on 20.2.2002 and a direction was given to the police to continue their investigation. Against the said order, this application was filed by the petitioner in this Court. An ad-interim relief was granted by this Court on 4.6.2002 and further investigation was stayed.

4. Rule. Respondent waives service. Rule is made returnable forthwith by consent of parties.

5. The learned Counsel for the petitioner has invited my attention to the provisions of Section 156(3), Section 200 and Section 202 of the Cr.P.C. He has also relied on the judgment of the Apex Court in the case of **Mohd. Yusuf v/s. Smt.Afaq Jahan & Anr., reported in AIR 2006 SC Page 705** and the judgment in the case of **Suresh Chand Jain, Appellant v/s. State of Madhya Pradesh and another, Respondents, reported in AIR 2001 SC 571.** He also invited my attention to the

judgment of the learned Single Judge of this Court in the case of **Bhagirathabai Rambhaukar Akotkar & Ors. V/s. State of Maharashtra and Anr., reported in 2007 ALL MR (Cri.) 1646** in support of submission that the order passed by the Magistrate was patently illegal since after having taken cognisance, it is not open for the Magistrate to direct the police to investigate under Section 156, therefore, a FIR which was lodged by the police was also liable to be quashed.

6. The learned Counsel for the respondent, on the other hand, invited my attention to the judgment of the Apex Court in the case of **Dharampal V/s. Ramshri, reported in AIR 1993 SC Page 1361.** He submitted that the Apex Court in the said case has held that the second revision was not maintainable and therefore, the High Court while exercising jurisdiction under Section 482 ought not to have interfere with the order passed by the Sessions Court in revision. He also relied on the judgment of the Division Bench of the Apex Court in the case of **Deepti alias Arati Rai vs. Akhil Rai reported in 1995 SCC (5) Page 751** in support of the said

submission. He also relied on the judgment of the Supreme Court in the Case of **Roshan Deen V/s. Preeti Lal, reported in (2002) 1 SCC Page 100** in support of the submission that even while exercising jurisdiction under Articles 226 and 227, the High Court should not exercise its writ jurisdiction merely for the purpose of correcting an error of law. He submitted that in the present case, the conduct of the petitioner clearly indicated that he had filed this application after investigation by the police was almost over and that after he had been kept behind bar for the period of 40 days. He submitted that therefore, the only attempt on the part of the petitioner was to delay the investigation and to protract the trial. He also, however, fairly pointed out the judgment of the Apex Court in the case of **Kailash Verma V/s. Punjab State Civil Supplies Corporation and Another, reported in (2005) 2 SCC Page 571** wherein it has been held that the remedy under Section 482 could be resorted to and such a petition could be entertained by the High Court if there was a serious miscarriage of justice and abuse of process of court or when mandatory provisions of law are

not complied with.

7. In the present case, the law in this regard in quite well settled in view of the judgments of the Apex Court in the case of **Mohd.Yunus (supra) and Suresh Chand Jain (supra).** The order of the Magistrate, therefore, directing the police to investigate under Section 156(3) after having taken cognisance of the private complaint, is clearly illegal and if the investigation is allowed to be continued, it would result in patent illegality being committed which ultimately may result in vitiating the entire investigation which would result in miscarriage of justice and would be prejudicial to the interest of the complainant. Under these circumstances, in my view, the ratio of the judgment of the Apex Court in the case of **Kailash Verma (supra)** is squarely applicable to the facts of the present case. In my view, there is a clear non-compliance of the mandatory provisions of law and therefore, in my view, it is essential to correct the mistake committed by the revisional court by exercising inherent jurisdiction under Section 482 and the power of superintendence under

Article 227. The present petition has been filed under Section 227 of the Constitution of India read with Section 482 of the Cr.P.C. The objection, therefore, which is taken by the learned Counsel for the respondent regarding the maintainability of this petition, in my view, cannot be accepted.

8. In the result, in view of the settled position in law, the impugned order passed by the Magistrate directing the police to investigate the matter under Section 156(3) and the FIR which is registered by the police on 17.12.2000 will have to be quashed and set aside. However, in my view, the Magistrate is competent to proceed under the provisions of Section 202 and consequently, directing the police to investigate the matter and submit its report since the police have already investigated the case under Section 156(3). Instead of starting the investigation again, the police may continue with the investigation from the stage on which the stay was granted by this Court and complete the investigation and submit a report. The Magistrate may, if he so feels appropriate, also record the

statement of the other witnesses and thereafter, pass an appropriate orders in accordance with law.

. With these directions, writ petition is made absolute in the above terms.

(V.M. KANADE, J.)